

# “India and the Rights of Indigenous People”

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## **Introduction**

The Government of India officially does not consider any specific section of its population as ‘indigenous people as generally understood and implied in its usage in the UN. Rather, the government claims all its peoples as indigenous. However, operationally in many of its dealings, those sections of people declared as falling within the administrative category of ‘Scheduled Tribes’ (STs) are considered as indigenous peoples. Though STs are not coterminous with either the socially and historically accepted term ‘Adivasi’ (meaning indigenous or original people) or ‘tribal’, by and large it is accepted that the STs include mostly ‘indigenous peoples’ in the Indian context. This ‘indigenouness’ is also recognized as distinct and different from ‘regionalism’ and finds clear and distinct expression in the constitution and laws. While recognizing that not all indigenous peoples are STs and vice versa, this study will focus on STs.

## **Classification of Scheduled Tribe**

‘Scheduled Tribe’ is an administrative term used for the purpose of ‘administering’ certain specific constitutional privileges, protection and benefits for specific section of peoples, historically considered disadvantaged and backward. Article 366(25) of the Constitution of India defines Scheduled Tribes as ‘such tribes or tribal communities or parts of, or groups within such tribes, or tribal communities as are deemed under Article 342 to be Scheduled Tribes for the purposes of this Constitution’. The Scheduled Tribe status confers on the tribe, or part of it, a Constitutional status invoking the safeguards provided for in the Constitution in their respective states/UTs. The Scheduled Tribe status is conferred on the basis of birth to a person into a Scheduled Tribe. Although no well-defined criteria have been developed for the purpose, the general official<sup>1</sup> refrain has been that the identification of Scheduled Tribe (ST) is done on the basis of the following characteristics:-

- (i) primitive traits;
- (ii) distinctive culture;
- (iii) geographical isolation;
- (iv) shyness of contact with the community at large; and
- (v) backwardness.

## **Legal and Policy Frameworks**

- The Constitution of India: This highly detailed document running into 395 Articles and Twelve Schedules forms the fundamental framework of the legal system as well as the political structure of the country. The provisions of the Constitution can be amended only by the Parliament through a specially prescribed procedure. Over the last 65 years

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<sup>1</sup> See the essential characteristics listed by the Ministry of Tribal Affairs available at <http://tribal.gov.in/index2.asp?sublinkid=542&langid=1>

there have been over 94 Amended laws. The Supreme Court in a far reaching judgment had held that the 'basic structure' of the Constitution cannot be amended, among other things, the Preamble also.<sup>2</sup>

- Legislations by the Parliament and State Legislatures, Rules and Government Notifications: The Constitution contains detailed prescriptions for law-making, including carefully delineated boundaries for the Central and State Legislatures<sup>3</sup>. All legislations must also conform to the fundamental rights<sup>4</sup>, and if found to be inconsistent, shall be declared void.<sup>5</sup>
- Judicial Precedent: Judicial decisions, which are a very important source of law, are also recognized as such by the Constitution. Accordingly, decisions of the Supreme Court are binding on all High Courts and subordinate courts. Decisions of High Courts generally are binding on the state over which they have jurisdiction. Decisions of subordinate courts, however, do not constitute judicial precedent.
- Customary law: Article 13 of the Constitution recognises 'custom or usage having in the territory of India the force of law' as part of the term 'law'. Some basic conditions for their recognition as customary law includes whether it finds its source in antiquity; is reasonable; is in conformity with statutory law; is followed openly and freely (as opposed to under coercion) and is consistent with morality and public policy. In certain aspects of personal laws, such as marriage, divorce and inheritance, religious texts are also accepted to a limited extent as an additional source of law.

### **Legal protection of indigenous people**

The UN Declaration on the Rights of Indigenous Peoples (UNDRIP) identifies 'indigenous peoples' as being the beneficiaries of the rights contained in the Declaration, without defining the term. The preamble of the Declaration<sup>6</sup>, however, makes reference to certain

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<sup>2</sup> Keshavananda Bharati v. State of Kerala (1973) 4 SCC 225

<sup>3</sup> In the Seventh Schedule

<sup>4</sup> In Chapter (Part III) of the Constitution

<sup>5</sup> Article 13

<sup>6</sup> The General Assembly,

Affirming that indigenous peoples are equal to all other peoples, while recognizing the right of all peoples to be different, to consider themselves different, and to be respected as such,

Concerned that indigenous peoples have suffered from historic injustices as a result of, inter alia, their colonization and dispossession of their lands, territories and resources, thus preventing them from exercising, in particular, their right to development in accordance with their own needs and interests,

Recognizing the urgent need to respect and promote the inherent rights of indigenous peoples which derive from their political, economic and social structures and from their cultures, spiritual traditions, histories and philosophies, especially their rights to their lands, territories and resources,

Welcoming the fact that indigenous peoples are organizing themselves for political, economic, social and cultural enhancement and in order to bring to an end all forms of discrimination and oppression wherever they occur, Recognizing also the urgent need to respect and promote the rights of indigenous peoples affirmed in treaties, agreements and other constructive arrangements with States,

Convinced that control by indigenous peoples over developments affecting them and their lands, territories and resources will enable them to maintain and strengthen their institutions, cultures and traditions, and to promote their development in accordance with their aspirations and needs,

Recognizing that respect for indigenous knowledge, cultures and traditional practices contributes to sustainable and equitable development and proper management of the environment,

characteristics normally attributed to indigenous peoples. The ‘indigenous peoples ‘consider themselves different’, have faced ‘historic injustices as a result of... their colonization and dispossession of their lands, territories and resources’ and ‘are organizing themselves for political, economic, social and cultural enhancement and in order to bring to an end all forms of discrimination and oppression’. Moreover, their ‘inherent rights...derive from their political, economic and social structures and from their cultures, spiritual traditions, histories and philosophies, especially their rights to their lands, territories and resources’ and are ‘affirmed in treaties, agreements and other constructive arrangements with States’. They also wish ‘to maintain and strengthen their institutions, cultures and traditions’, desire ‘the demilitarization of the lands and territories’ for ‘peace, economic and social progress and development’. Their ‘knowledge, cultures and traditional practices contribute to sustainable and equitable development and proper management of the environment’. They also ‘possess collective rights which are indispensable for their existence, well-being and integral development as peoples’

The Constitution of India in its Preamble bears a commitment to the concept of equality of all citizens before the law, when it commits to the vision of ‘Equality of status and opportunity’ as a core part of the aspiration of a newly independent state. The Right to Equality has been held to be part of the ‘basic structure’ of the Constitution and therefore unalterable even by constitutional amendment.<sup>7</sup>

Not surprisingly, the Fundamental Rights Chapter of the Constitution (Part III) details the concept of equality at some length. Article 14 recognises the right to equality before law and equal protection of the law and makes the same available to all persons, that is, citizens as well as non-citizens. The Constitutional provisions as well as numerous judicial precedents firmly establish that a mere ‘formal’ equality approach has been rejected. Instead, the Constitution clearly recognises that to be completely meaningful, a ‘substantive’ approach to equality has to be adopted, and therefore the historical discrimination of certain groups and classes must not only be abjured by the state, but concrete steps must be taken to reverse the present consequences of such historical discrimination. It is only with such a substantive or affirmative approach will equality be achieved in a real sense. Thus the principle of substantive equality has been imported into Article 14 through numerous judicial precedents. In keeping with this approach to Equality, the Constitution recognises the right against discrimination in Article 15 which prohibits discrimination of any citizen by the state on grounds of religion, race, caste, sex, place of birth, or any of them. The Article insists on affirmative action in the form of special provisions for ‘socially and educationally backward classes of citizens or for STs’ as a part of this right<sup>8</sup>. Similarly Article 16 prohibits

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Emphasizing the contribution of the demilitarization of the lands and territories of indigenous peoples to peace, economic and social progress and development, understanding and friendly relations among nations and peoples of the world, Recognizing and reaffirming that indigenous individuals are entitled without discrimination to all human rights recognized in international law, and that indigenous peoples possess collective rights which are indispensable for their existence, well-being and integral development as peoples,

<sup>7</sup> The principle of basic structure has been articulated in *Keshavananda Bharati v. St of Kerala* (1973) 4 SCC 225,

<sup>8</sup> Article 15(4)

discrimination in public employment on grounds of religion, race, caste, sex, descent, place of birth, or any of them, and at the same time permits reservations in employment for ‘backward class of citizens’<sup>9</sup>, as also reservations in promotions for STs<sup>10</sup>. Article 17 prohibits the practice of untouchability in any form, and states that such practices will be offences under criminal law.

The Directive Principles of State Policy also contain several provisions which directly and indirectly impart the right to equality as understood in the Constitution. The Supreme Court in numerous judgments has held that these principles inform the right to life and dignity under Article 21. Key among these are two provisions which are understood to articulate the concept of ‘distributive justice’:

- Article 38 places a duty on the state to “secure a social order in which justice, social, economic and political, shall inform all the institutions of the national life” and in particular to minimize inequalities in income and eliminate inequalities in status among individuals and amongst groups of people;
- Article 39 contains critical obligations of the state to direct its policy towards what has come to be known as ‘distributive justice’, with respect to adequate means of livelihood, ownership and control of material resources, minimization of concentration of wealth in the economic system, and so on.

## **PROTECTION OF ST/SC UNDER INDIAN LEGAL SYSTEM**

The legal framework of India has been drafted to include the rights of everyone and to ensure the protection of all. The Indian constitution, which is the backbone of the Indian legal system has beautifully drafted out provisions to ensure everyone has equal rights. The fundamental rights ensure that no person will be denied the basic rights needed by him/her for sustaining themselves.

Under the Indian constitution, there are various articles which have been drafted specifically for ensuring the protection of the rights of the people of the backward class.

**Article 17** seeks to abolish ‘untouchability’: The institution of ‘untouchability’ refers not just to the avoidance or prohibition of physical contact but to a much broader set of social sanctions.

**Article 46** – Promote the educational and economic interests of SCs, STs, and other weaker sections of the society and to protect them from social injustice and exploitation

**Article 338** – National Commission for Scheduled Castes

Its functions include among others:

- Investigate and monitor all matters relating to the constitutional and other legal safeguards for the SCs and to evaluate their working;

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<sup>9</sup> Article 16(4)

<sup>10</sup> Article 16 (4-A), which has been inserted by the Constitution (Seventy Seventh) Amendment Act 1995.

- Inquire into specific complaints with respect to the deprivation of rights and safeguards of the SCs;

### **Article 338-A – National Commission for Scheduled Tribes**

Its functions are same as that of NCSC, but with respect to ST than SC

The state legislations have also brought in various

One of the major steps which was taken as a part of bringing proper security and protection of rights of these people was the SC/ST PREVENTION OF ATROCITIES ACT, 1989 (POA)

This schedule has 23 articles with 5 chapters. It has been drafted in detail capturing all the issues faced by the backward class as a step in providing better safety to their rights. Despite the existence of the provisions in the Indian constitution and the Indian penal code, the protection of these people were still not guaranteed, hence a need for the POA act came up. Throughout the history of India, if we scan the societal norms that existed, it is clear that the backward caste did not have any respect or security. They were continuously harmed and exploited simply because the society felt that they had the right to do so. It was only in the later years did we realise what a major human right violation it was.

As discussed above, the definition for scheduled caste and scheduled tribe has been given in articles 341 and 342 of the constitution respectively. The definitions have also been discussed in articles 366 of the constitution of India. With reference to this the framework of the POA act has been made.

Chapter II of the POA act speaks about the offences of atrocities. This is the crux of the entire act and is one of the most important elements of the act. It has clearly laid down what kinds of acts constitute an offence and also the punishment each offence will attract if committed. One thing that stand out of this act is that every offence mentioned in the act has also been mentioned in the IPC also as a proper offence. Hence it is quite clear that the magnitude of the issues being faced by the backward classes were quite deep.

Let us look at some examples of these atrocities being faced by them:-

#### **1. HONOUR KILLING**

In a society like India, where caste structures are still dominant in the form of endogamy, honour killings are prevalent on a wide scale. Dalits are almost always at the receiving end of the violence.

In *Lata Singh vs. the State of UP*, Supreme Court has opined that inter-caste marriages are in the national interest as they destroy the caste system.

*Bhagwan Dass v. Delhi* deemed honour killings in the “rarest of rare” category of crimes that deserve the death penalty.

## 2. SOCIAL BOYCOTT

Khap panchayat – caste panchayat often acts as an arena for perpetuating atrocities against Dalits by ostracizing them from the society.

Maharashtra enacted a law against a social boycott: Maharashtra Prohibition of People from Social Boycott (Prevention, Prohibition and Redressal) Act, 2016.

Law Commission drafted the Prohibition of Unlawful Assembly (Interference with the Freedom of Matrimonial Alliances) Bill, 2011 that sought to declare khap panchayats unlawful.

These are just some of the very common issues that come up against the backward class in modern day India. The death of **Rohit Vemula** took the nation by storm bringing shame to the country's system and norms. The fact that casteist extremism is still so prevalent in modern India even after 70 years of independence baffled the entire country. Rohit Vemula's death is just one of the many incidents which shows how deep the roots of caste system work within the country.

The government has introduced many measures for preventing these atrocities, especially under the aegis of Article 17. Most important among them is PoA act, which was and is a watershed act for tilting the power balance of society. Its implementation has seen many stumbling blocks leading to many atrocities against people from the backward classes as shown above. These atrocities are widespread throughout the breadth of the nation.

### **Socio-economic rights**

A summary of the provisions in the ILO conventions relating to socio-economic rights of indigenous people has already been made in sections 2 and 8 above, and therefore is not being repeated.

The Constitution of India in Article 23 prohibits traffic in human beings, begar or forced labour. This fundamental right is re-enforced by several provisions in the Directive Principles of State Policy, including Article 38 (promotion of a just social order) Article 39 (distributive justice) Article 41 (right to work) Article 43 (securing a living wage for all workers) and Article 46 (promotion of economic interests of SCs and STs).

Exploitation of labour extends across sectors and regions, but it tends to take particularly brutal forms in the case of STs. For Adivasi and tribal communities in central and mainland India (i.e. outside the Northeast), the loss of land and common resources over the past century (see section on Land, Natural Resources and the Environment above) has meant that access to forest produce – such as wild fruits and vegetables, medicinal herbs, etc. - has greatly declined. These or equivalents now have to be purchased from the market, forcing Adivasis

to resort to wage labour, if available. One study for instance found that only 12% of Bhil Adivasis in Gujarat could survive based on their agricultural land holdings alone<sup>11</sup>.

The resulting desperation forces Adivasis in most parts of Central India into seasonal migration for wage labour, which is often in addition to or combined with debt bondage to particular employers. The same study on Bhils in Gujarat found that 85% of families were forced to migrate every year to earn enough to survive, while a report from Maharashtra put the figure for Adivasis in that state at 80%<sup>12</sup>. There are no official figures on how many people engage in seasonal migration in India, but estimates say that around 30 million people migrate every year, and the figure is rising.<sup>13</sup> Conditions of work for such migrant workers are abysmal in many areas, with hardly any shelter provided, food and water in short supply, and work days that are often 14 to 16 hours long. Sexual abuse of women is particularly common, as well as brutal violence against those who resist exploitation. Adivasi women are also often forced to become sex workers, sometimes at or near migrant worksites and sometimes in their home areas.

India has a number of protective labour laws. In recognition of the reality that the working class, drawn as it is from sections of society which are already marginalized as a result of historical domination by the upper castes and ruling elites, the Central government has enacted a number of key legislations in this area :

- Minimum Wages Act, 1948
- Contract Labour (Prohibition and Regulation) Act 1970
- Bonded Labour System (Abolition) Act, 1976
- Inter State Migrant Workmen (Regulation of Employment and Conditions of Service) Act 1979
- The Building and Other Construction Workers (Regulation of Employment and Conditions of Service) Act 1996
- The Building and Other Construction Workers Welfare Cess Act 1996

The provisions of the Constitution as well as the statutory framework have also been established in the law through judicial precedent in several far reaching decisions of the Supreme Court wherein it has been held that forced labour of any kind is prohibited by Article 23, and it has further been articulated that wherever it is found that workers are employed for a wage that is below the minimum wage prescribed by statute, the same shall be an offence under the Bonded Labour Abolition Act.<sup>213</sup>

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<sup>11</sup> David Mosse, Sanjeev Gupta, Mona Mehta, Vidya Shah, Julia fnms Rees, and KRIBP Project Team. Brokered livelihoods: Debt, Labour Migration and Development in Tribal Western India. *Journal of Development Studies*, 38 (June 2002.): 59-88.

<sup>12</sup> Bulsara, Shiraz and Sreenivasa, Priyadarshini. Driven to bondage and starvation, *Combat Law*, Volume 2, Issue 5.

<sup>13</sup> Deshingkar, Priya, and Daniel Start. *Seasonal Migration for Livelihoods in India: Coping, Accumulation and Exclusion*. Working Paper. London: Overseas Development Institute, August, 2003.

## **Executive Summary**

India is home to the largest population of indigenous peoples of any country in the world. Roughly a quarter of the world's indigenous population – around 80 million people – are scattered across India, their numbers a staggering diversity of ethnicities, cultures and socio-economic situations. They range from some of the last uncontacted indigenous communities in the world, like the Sentinelese of the Andamans, to some of the largest, such as the Gonds and Santhals of central India. They include not only communities who live under conditions of extreme destitution, but also communities with social indicators well above the national average. But across circumstances and areas, like other indigenous communities around the world, India's indigenous peoples do share one characteristic – social, political and economic marginalisation.

In recognition of this fact and reflecting more than a century and a half of continuous struggles by indigenous people, India has a panoply of laws, policies and Constitutional provisions aimed at protecting the rights of such communities. Yet India is also distinguished by the extreme reluctance of the government to acknowledge or accept the international framework for such protections, embodied primarily in International Labor Organization (ILO) Convention No. 169 on Indigenous and Tribal Peoples, 1989 and the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), 2007. While India is a signatory to ILO Convention No. 107 on Indigenous and Tribal Populations (the predecessor to Convention 169) and voted in favour of the UNDRIP, it has adamantly insisted that its own indigenous peoples cannot claim status or protection under these laws. The government rejects the very term 'indigenous peoples', insisting that all Indians are indigenous, and is particularly hostile to any reference to the rights of indigenous people to autonomy, self-governance or self-determination. This is despite the fact that India's own laws provide for varying degrees of such protection - in some cases, far reaching - to certain communities.